IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

LUFKIN DIVISION

UNITED STATES OF AMERICA ex rel. J. BENJAMIN JOHNSON, JR., et al.	§	
V.	§	CIVIL ACTION NO. 9:96 CV 66
SHELL OIL COMPANY, et al.	§	

MEMORANDUM AND ORDER

Before the Court is the Defendants'[1] Motion and Memorandum to Dismiss Relators' Claims for Lack of Subject Matter Jurisdiction Under 31 U.S.C. § 3730(b)(5) (Doc. #345). Defendants move, pursuant to Rule 12(b)(1), to dismiss the claims of Relators Martineck, Wright, Brock, Brain, and the Project on Government Oversight ("POGO") asserting that the Court lacks subject matter jurisdiction. After reviewing the motions, briefs and materials submitted by the parties, hearing the arguments of counsel, and reviewing the applicable law, the Court is ready to make its ruling.

[1]Defendants are all the named defendants.

BACKGROUND

This action under the False Claim Act, 31 U.S.C. 3729 *et seq.*, was commenced on February 16, 1996 by the filing, under seal, of an Original Complaint by Relator J. Benjamin Johnson, Jr. The suit named as defendants Exxon Corporation, Chevron Corporation, Shell Oil Company, Mobil Oil Corporation, Conoco. Inc., Texaco, Inc., Marathon Oil Company, Unocal Corporation, Pennzoil Company, B. P. America, Kerr-McGee Corporation, Amoco Corporation, and a number of others companies that have since been dropped by the relators in their consolidated complaints. Johnson sued to recover penalties and damages arising from the defendants' false statements regarding the royalties owned and/or paid to the United States by the defendants for crude oil produced from Government owned lands. He alleged the defendants had historically underpaid oil royalties to the Government by calculating the royalties using prices substantially lower then the consideration the defendants actually have received for the oil. The complaint states that the value of production of oil from Government owned lands, for royalty purposes, is determined according to the valuation standards set forth in 30 C.F.R. §206.102 (1995). The complaint further alleged that the foundation on which these valuation standards are based is the requirement that the value of oil for royalty computation purposes is the value of the oil that would have been received pursuant to an arm's-length sale, or true fair market

value. It is alleged that for the last decade, the "value" on which the defendants have calculated and paid the Government royalties, however, typically has been the "posted price" of the oil for the field from which the oil was produced. Johnson alleged that these "posted prices" are, in fact, artificially low prices set by the defendants and are substantially less than the true value of the oil ultimately received by the defendants. Johnson alleged that the defendants used four techniques to shortchange the Government of its proper royalty payments: 1.) misrepresenting that the first sale of oil under buy/sell agreements is the actual value received for the oil; 2.) buying and selling non-operated working interest crude oil at the wellhead at values less than what should have been received in an arm's-length transaction with the implicit understanding that as long as approximately equal volumes are brought and sold, the net financial impact is neutral; 3.) using sales to affiliated companies to mask the true value of the oil, and 4.) using an artificially low price for valuing the oil when it is refined by the defendants and never finally sold.

On July 12, 1996, Johnson filed the First Amended Original Complaint wherein he was joined by Relator John Martineck. Johnson and Martineck added some subsidiaries of the previously named defendants and added some new defendants. The substance of the fraudulent conduct alleged against the defendants in the First Amended Original Complaint is substantially the same as was alleged in

the first complaint.

On August 2, 1996, Relator Harrold E. ("Gene")Wright filed a False Claims Act action, under seal, in the Texarkana Division.[2] Wright sued most, if not all of the companies named by Johnson and Martineck, and added several others, totaling 143 defendants. Wright alleged that the defendants, over the past ten years, had engaged in a nationwide scheme of systematic underpayments of oil royalties owed to the United States from all Federal onshore, Indian and Outer Continental Shelf leases in which the defendants owned interests. The oil royalties have been paid on so called "posted prices" which were conspiratorially set by certain of the defendants below the sale price actually accruing to the defendants.[3] Wright alleged that the MSS-2014 forms filed by the defendants to report the value of the oil taken from federal and Indian Land leases were knowingly false.

On June 9, 1997, Realtors Leonard Brock, Danielle Brain, and POGO filed two additional False Claims Act actions, under seal.[4] One suit covered California on and offshore leases a ıd the second covered all federal leases exclusiv.: of those in

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[2]Cause No. 5:96 CV 243.

[3] Wright also alleged that the defendant have under paid royalties on gas and natural gas liquids. This part was severed off from the allegations regarding oil and made into a separate case.

[4]Cause Nos. 9:97 CV 208 and 9:97 CV 209.

California. These relators named approximately 285 defendants. Brock, Brian, and POGO alleged underpayment of royalties on federal and Indian lands, on and off shore of California, due to defendants engaging in five "devious illegal schemes." They are: 1.) creating an artificially low "posted price;" 2.) receiving a "premium" on which they didn't pay royalties; 3.) receiving price breaks on transportation, the value of which was not reported; 4.) oil exchanges on which royalties were not paid on the fair market value of the oil; and 5.) generally paying royalties on less than fair market value.

On July 24, 1997, on the *ex parte* motion of the United States, this Court consolidated all four cases during the pendency of the *qui tam* investigation. On February 18, 1998, the United States elected to intervene in the suit as to Shell Oil Company, Amoco Oil Company, Conoco Inc., and Burlington Resources, Inc. and their various subsidiaries and affiliates.[5] Also on February 18, 1998, the relators jointly moved the Court to consolidate the cases, stating that "[b]ecause the actions are so similar from a legal and factual perspective, there is virtually no risk of prejudice or possible confusion to any of the parties if the cases were to be consolidated." The Court granted the consolidation "for all purposes, including

[5]Later the government also intervened against Texaco, Inc.

discovery and trial." On that date the case was unsealed and was ordered to be served on the defendants.

The relators have twice amended their consolidated complaint since the case was consolidated. The current pleading is the Relators' Consolidated and Second Amended Complaint, filed September 29, 1998. In this pleading the relators have dropped many of the companies named previously by various relators. The current complaint names eighteen major oil companies plus numerous subsidiaries or affiliates. Relators now allege fraudulent conduct on the part of the defendants resulting in underpayment of oil royalties for the last twelve years. The allegations of Brock, Brian and POGO regarding conduct previous to that time have been dropped.

In brief, defendants argue that §3730(b)(5) establishes a "first to file" rule that precludes the claims of relators Martineck, Wright, Brock, Brian and POGO. Defendants argue that these relators were improperly allowed to intervene in the pending suit first filed by Johnson and/or that they filed a lawsuit in a related matter in violation of the statutory bar established by § 3730(b)(5). Defendants interpret § 3730(b)(5) as jurisdictional. Accordingly, they argue that the Court has no jurisdiction over any claims raised by relators Martineck, Wright, Brock, Brian and POGO.

The relators argue that the voluntary consolidation of Relators' Complaints into this unified action created a single case, just as though one compliant originally had been filed. In essence, they argue that since the Court has previously consolidated the case for all purposes, the cases filed by the various relators lost their separate identities, became a single action, and that the consolidation nullified the status of the relators as they originally stood when they filed their individual cases. Further, they argue that § 3730(b)(5) is not jurisdictional. They say the language of that section only bars intervention into an existing lawsuit and the filing of related actions. They assert that no intervention or filing of a related action occurred in this case.

DISCUSSION

31 U.S.C. § 3730(b)(5) provides: "When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action."

The purpose of this barrier is to prevent parasitic lawsuits. *United States of America, ex rel. LaCorte v. Smithkline Beecham Clinical Laboratories, Inc.,* 149 F.3d 227, 233 (3d Cir. 1998) ("Section 3730(b)(5) attempts to reconcile two conflicting goals, specifically, preventing opportunistic suits, on the one hand, while encouraging citizens to act as whistleblowers, on the other."); *Erickson ex rel. United States v. American Institute of Biological Sciences*, 716 F. Supp. 908, 918 (E.D. Va. 1989) ("A

subsequently filed qui tam suit may continue only to the extent that it is (a) based on facts different from those alleged in the prior suit and (b) gives rise to separate and distinct recovery by the Government.")

The defendants argue that § 3730(b)(5) is jurisdictional in nature. The relators disagree. There is little case law on this point. However, what little there is seems to favor defendants' interpretation. *See United States of America, ex rel. Merena v. Smithkline Beecham Corp.*, 1997 U.S. Dist. LEXIS 19896 (D. C. Penn, July 21, 1997) wherein, at footnote 21, the court stated, "[n]otably, I find that § 3730(b)(5) is 'jurisdictional' in nature, as its application presents a threshold issue regarding the court's ability to hear a later-filed qui tam action." In *Hyatt v. Northrop Corp.*, 1989 U.S. Dist. LEXIS 18941 (C.D. Cal., Dec. 27, 1989) the court dismissed with prejudice claims it found barred by § 3730(b)(5). In *United States of America, ex rel. LaCorte v. Smithkline Beecham Clinical Laboratories, Inc.*, 149 F.3d 227, 237 (3d Cir. 1998), in *dicta*, the Third Circuit applied §3730(b)(5) to a situation of two groups of relators. The second group of relators, (Clausen, Miller and LaCorte) challenged the status of the first group of consolidated relators, (Merena, and the Grossenbacher and Spear parties) arguing that only the original relator (Merena) was entitled to recover and that the claims of Grossenbacher and Spear were barred. The Third Circuit held that the second group of relators did not have standing to challenge the consolidated

relators' status, but noted, "Clausen is correct that Merena filed his complaint before any of the other consolidated relators, and that §3730(b)(5) therefore would bar any claims in the Grossenbacher and Spear complaints that repeat Merena's allegations."[6]

The Court finds the above reasoning persuasive and holds that §3730(b)(5) is jurisdictional in nature because it poses a threshold issue of the Court's ability to hear the later-filed qui tam actions. Thus, we must examine whether the Court had jurisdiction over the later filed actions before the consolidation of the cases took place.

Relator Martineck:

Rule 15(a) Fed. R. Civ. P. provides that, "a party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served...." It is undisputed that the defendants had not been served at the time Relator Johnson first amended his pleading to include Relator Martineck. The case was under seal at that time. This rule governs the addition of parties by amendment of a complaint as well as the addition of allegations against existing defendants. *Hines v.*

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[6]*Cf. United State of America ex rel. Dorsey v. Dr. Warren E. Smith Community M.H./M.R. Centers,* 1997 U.S. Dist. LEXIS 9424 (C.D. Penn., June 25, 1997) (wherein in *dicta*, the court states "... I doubt that § 3730(b)(5) is also jurisdictional in nature....")

Delta Air Lines, Inc., 461 F.2d 576, 580 (5th Cir. 1972); *See also, Brever v. Rockwell Int'l Corp.*, 40 F.3d 1119 (10th Cir. 1994); *Washington v. New York City Board of Estimate,* 709 F.2d 792, 795 (2nd Cir. 1983). Therefore, the Court finds that Relator Martineck is not an intervenor, nor has he filed a "related" action. Thus, he is a proper party in the case and his participation is not barred by §3730(b)(5).

Relators Wright, Brock, Brain and POGO:

The status of Relators Wright, Brock, Brain, and POGO differs from that of Relator Martineck. These relators filed separate actions with the court after Relator Johnson filed his initial complaint. Although the Court does not agree with defendants position that these filings and the subsequent consolidation constituted an intervention by these relators, it does agree that these actions were "related" within the meaning of §3730(b)(5) and thus the Court is jurisdictionally barred from hearing their claims. The essence of each of these lawsuits is that the defendant oil companies underpaid the royalties owed on oil taken from Federal and Indian land through undervaluing the oil.

Both the government and the relators have previously acknowledged the "related" nature of these cases in filings made with the Court. The government, in its motion for a partial lifting of the seal and for leave to advise Relators Johnson, Martineck and Wright of each others' actions stated that both actions made

"essentially the same allegations" regarding "a consistent pattern of underpaying crude oil royalties due on Federal leases."[7] In its motion to consolidate the Johnson, Martineck and Wright actions, the government stated, "The theories of liability and damages as to royalties alleged in both cases are substantially identical."[8] In relation to the action brought by Relators Brock, Brian, and POGO, the government made the same motion to advise the other relators of the existence of each others' actions. In that motion, the government noted that all of the actions include "essentially the same allegations" regarding the payment by defendants of their royalty obligations to the government.[9] On July 16, 1997, the government moved to consolidate all four actions. The motion to consolidate informed the Court that all four cases "address the same or similar issues of law and facts; to wit, whether or not oil companies violated the terms of the False Claims Act by underpaying royalties owed to the United States."[10]

The relators, in their joint motion to consolidate their lawsuits, stated "[b]ecause the actions are so similar from a legal and factual perspective, there is

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[7]Document No. 11.

[8]Document No. 13.

[9]Document No. 32.

[10]Document No. 38.

virtually no risk of prejudice or possible confusion to any of the parties if the cases were to be consolidated."[11] The defendants point out that in this motion, the relators went on to assert:

> Specifically, each pending action alleges that the oil company defendants have continually and systematically underpaid royalties owed the federal government for crude oil taken from federal onshore and offshore leases. Each action further asserts that such underpayments were the result of crude oil royalties being calculated based on 'posted prices' for such royalty oil, as opposed to the market value of such oil an/or the actual amounts received by defendants from the sale of such oil in an arms length third-party transaction. The actions assert substantially identical legal theories of liability against the various defendants.[12]

In granting their motion to consolidate, the Court made express findings adopting the above language. The relators are bound by this previous admission. Accordingly, the Court finds that the actions filed by Relators Wright, Brock, Brian and POGO are "related" to the action first filed by Relators Johnson and Martineck and thus are barred by § 3730(b)(5).

IT IS THEREFORE ORDERED that the Defendants' Motion to Dismiss

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[11]Document No. 53.

[12]*Id.*

Relators' Claims for Lack of Subject Matter Jurisdiction Under 31 U.S.C. § 3730(b)(5) is GRANTED as to Relators Wright,[13] Brock, Brian and POGO.

IT IS ORDERED that the Defendants' Motion to Dismiss Relators' Claims for Lack of Subject Matter Jurisdiction Under 31 U.S.C. § 3730(b)(5) as to Relator Martineck is DENIED.

SIGNED this 8th day of December, 1998.

JOHN HANNAH, JR.
UNITED STATES DISTRICT JUDGE

[13]This order, as to Relator Wright, only applies to the claims regarding oil royalties in his initial action.